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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 267

SIX COMPANIES OF CALIFORNIA, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLENS FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

PETITIONERS' REPLY BRIEF

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Subject Index

I.

REASONS FOR PETITIONERS' REQUEST FOR CERTIORARI IN THIS CASE.

The basis upon which we request this Court to issue its writ of certiorari in this case is that the United States Circuit Court of Appeals for the Ninth Circuit, contrary to prior decisions of this Court, has declined to follow and apply the law of California in a cause tried in a District Court of the United States for the Northern District of that State. The brief of respondent in opposition to the petition tends to confuse this primary issue by the inclusion therein of a rather extensive argument attempting to show that the case of *Sinnott v. Schumacher* (1919) 45 Cal. App. 46, 187 Pac. 105, does not decide what the Circuit Court of Appeals held that it decided and by a further argument that, even if the Circuit Court of Appeals was in error in affirming the judgment for liquidated damages, the petition should be denied because respondent is entitled to actual damages in a similar amount. Neither proposition urged by respondent is sound, as we shall hereinafter point out, but, before answering these arguments, we desire to make clear the reasons for requesting that the decision of the Circuit Court of Appeals be reversed.

The Circuit Court of Appeals has announced in its opinion rendered in this case that it is not bound by a decision of a District Court of Appeal of California which the Supreme Court of the State refused to review.

If certiorari is denied in this case and the opinion of the Circuit Court of Appeals is permitted to stand it will be followed hereafter by that Court and the District Courts in the Ninth Circuit and probably in other Circuits. As we pointed out, at pages 21 and 22 of our opening brief, this will inevitably lead to the application, in many cases, of one rule in the federal trial courts and another in the state trial courts.

Is a decision of a District Court of Appeal of California, a court with broad appellate jurisdiction, the decisions of which are binding on state trial courts and, as we contend, on courts of coordinate appellate jurisdiction, which decision the State Supreme Court has refused to review, likewise binding on federal courts or are the federal courts free to disregard such decision and apply their own rules? The opinion of the Circuit Court of Appeals in this case presents that question squarely. The correct answer is a matter of public concern. It will affect the rights, not only of the litigants now before the Court, but the rights and obligations of the many who will hereafter engage in litigation in the United States District Courts. It is submitted that the doubt should now be set at rest by an authoritative decision by this Court.

We have pointed out in our brief in support of the petition the importance of the decisions of the California District Courts of Appeal in shaping the law of this State. Their original appellate jurisdiction is very broad and their jurisdiction to hear and decide cases transferred to them by the Supreme Court is coordinate with the jurisdiction of that Court itself (appendix pp. v and vi, opening brief).

Their jurisdiction is not limited to deciding appeals from trial courts in their own districts (opening brief pp. 24-27).

The jurisdiction of these Courts and the binding effect of their decisions have been fully set forth in our opening brief and in the interest of brevity we respectfully refer the Court to that brief.

Respondent relies upon *People v. Davis* (1905) 147 Cal. 346, 81 Pac. 718, to support its assertion that the denial by the Supreme Court of a hearing, after decision by the District Court of Appeal, is not an approval of the propositions of law set forth in the opinion of the District Court of Appeal. But, as we pointed out at pages 22-24 of our opening brief, the rule is different where the case is originally appealed to the Supreme Court and thereafter transferred to the District Court of Appeal for hearing. That was the situation in *Sinnott v. Schumacher.*

We have set forth in our opening brief our construction of prior decisions of this Court and we merely affirm, without repetition, what we have said

there. We think the decisions cited at pages 27-29 of that brief are decisive of the point.

II.

THE DECISION IN SINNOTT V. SCHUMACHER, 45 CAL. APP. 46, 187 PAC. 105, DECIDED SQUARELY THE POINT THAT THE LIQUIDATED DAMAGE CLAUSE IN A CONSTRUCTION CONTRACT DOES NOT APPLY AFTER ABANDONMENT.

On this point the Circuit Court of Appeals agrees with petitioners (R. 2629). Respondent takes the position (pp. 24-29 of its brief) that both that Court and petitioners are incorrect in their interpretation of the holding in that case and quotes in the appendix to its brief excerpts from the record and briefs in the *Sinnott* case which it claims support its argument.

The *Sinnott* case was very similar to the case at bar. There, as here, the contractor claimed that the owner had breached the contract by failing to make progress payments that were due. There, as here, the contractor rescinded and sued for the value of the work done. There, as here, the owner answered and filed a cross-complaint against the contractor for breach of contract. In both cases the owner, in the cross-complaint, asked for damages from delay. The only difference is that in this case the owner sought to recover liquidated damages under the liquidated damage clause in the contract whereas in the *Sinnott* case

the owner ignored the liquidated damage clause and asked for actual damages from delay (Paragraph V, cross-complaint, appendix p. i, respondent's brief). The trial court found that the contractor had abandoned the contract and allowed the owner actual damages for delay (Paragraph VI findings, appendix p. i, respondent's brief).

The contract in that case contained a provision for liquidated damages to be paid by the contractor for delay in the amount of ten dollars per day. We have printed that part of the contract in the appendix here to.

In his opening brief the contractor (appellant) specifically attacked this finding of the trial court awarding *actual* damages for delay and contended that the maximum amount which the owner could recover as damages from delay was the liquidated damages provided in the contract (Excerpt from plaintiff's opening brief printed at appendix pages i to iii of respondent's brief).

The owner (respondent) specifically answered this contention in his reply brief and made the distinction between the right to recover actual damages for delay in case of an absolute breach and "special damage under the terms of the contract *had it been otherwise fulfilled.*"* (Appendix page iv, respondent's brief).

The issue was thus squarely presented to the Appellate Court as to whether the liquidated damage pro-

*Emphasis throughout this brief is supplied unless otherwise indicated.

vision of the contract governed the amount of damages for delay after abandonment of the contract and it was held that it did not. The Court said, at page 52:

> "As to the appellants' contention that the court was in error in its finding and conclusion as to the amount of damages sustained by the defendants and cross-complainants by reason of the plaintiff's unjustified abandonment of work upon said building, and his failure, neglect, and refusal to complete the same, it may be stated that this contention is based upon the clause in the contract which relates to the matter of delay in the time of completion of said building and which purports to fix a penalty of fifty dollars per day for such delay; *but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause,* in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be affected or limited by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion."

If, as the Court clearly held, the liquidated damage clause has no application after abandonment, no recovery by the owner under it can be had in such case. It cannot logically be said that this provision of the contract remains binding on the contractor but not on the owner. It is either mutually enforceable by both parties after abandonment or it ceases to be binding on either. The Circuit Court of Appeals was

correct in holding that the decision in *Sinnott v. Schumacher* on this point was adverse to its own decision in this case.

The Circuit Court of Appeals states that although there was a petition for hearing by the Supreme Court of California in the *Sinnott* case it was not on the point here involved.

While it is true that this point was not *argued* in the petition, the entire opinion of the District Court of Appeal was a part of the petition and before the Supreme Court for review. As we pointed out in our brief in support of this petition (pp. 22-24), the *Sinnott* case was first properly appealed to the Supreme Court and then referred to the District Court of Appeal for hearing. In such cases the rule is that the Supreme Court, on petition to it for a hearing, reviews not only the opinion to see whether it correctly states the law but examines the entire record (See quotation from *Burke v. Maze* (1909) 10 Cal. App. 206, 101 Pac. 438, at page 23 of our brief in support of the petition).

The decision in *People v. Davis* (1905) 147 Cal. 346, 81 Pac. 718, cited at page 16 of respondent's brief and other cases cited at page 17 thereof, state the rule in cases which are *originally* appealable to the District Courts of Appeal and have no application to the *Sinnott* case.

Under the rule which governed consideration of the petition for hearing in the *Sinnott* case the Supreme Court would not have denied the petition unless

it considered the opinion of the District Court of Appeal correct not only on its face but on a review of the entire record. Furthermore, the point involved appeared clearly in the opinion of the District Court of Appeal.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE RULE WHICH PREVAILS IN OTHER JURISDICTIONS, BUT NOT IN CALIFORNIA, IN DECIDING THAT THE LIQUIDATED DAMAGE CLAUSE IN THE CONTRACT WAS VALID.

It has long since been decided by this Court that where a state statute establishes a rule of law the federal courts must follow it. We have pointed out, at pp. 33-38 of our opening brief, that the validity of liquidated damage provisions in contracts is governed entirely by statute in California and that the Circuit Court of Appeals sustained the clause in this contract by applying, not the California statute, but a general rule prevailing in other jurisdictions. We submit that in so doing it committed error. To avoid repetition, we respectfully refer the Court to the argument in our opening brief on this point.

IV.

THE STATEMENT IN PETITIONERS' BRIEF IN SUPPORT OF THE PETITION THAT RESPONDENT NEITHER PLEADED NOR ATTEMPTED TO PROVE ACTUAL DAMAGES IS ACCURATE AND CORRECT.

Respondent, at pages 5-9 of its brief, states that petitioners are inaccurate in stating that respondent neither pleaded nor attempted to prove actual damages. At pages 33-35 of its brief respondent argues that even if it is not entitled to liquidated damages for delay it is entitled to actual damages in the amount of the judgment. As these two contentions are related, we shall make one answer to them.

(a) The pleadings.

The cross-complaint seeks only enforcement of the liquidated damage clause of the contract. In paragraph XI (R. 53) it alleges the delay. In paragraph XII (R. 55) it refers to the liquidated damage provision. In paragraph XIII it alleges that the actual damage would be extremely difficult to estimate and sets forth the facts upon which it relies to prove, *not actual damages, but that such damages would be extremely difficult to estimate.* In paragraph XIV (R. 57) it alleges that it claims *"the sum of $206,500.00 as agreed and liquidated damages."* Nowhere in the cross-complaint does respondent ask actual damages for delay.

(b) Theory on which evidence on damage was admitted at the trial.

The record is very clear that the evidence on all of these items was offered, not for the purpose of

proving actual damages, but for the sole purpose of sustaining the validity of the liquidated damage clause by showing that actual damages would be extremely difficult to determine.

When such evidence was first offered, petitioners objected upon the ground, among others, that it was an attempt to prove "damages which are speculative and not in any manner within the purview of any theory upon which they (respondent) might recover under this cross-complaint" (R. 2518).

Counsel for respondent then specifically limited the purpose of the offer to prove that the liquidated damage clause was reasonable and expressly stated that respondent did not ask anything but liquidated damages (R. 2519-20, quoted at appendix pages iv and v of respondent's brief).

Respondent admits all this in its brief at page 34.

After the evidence was closed and both parties had rested (R. 2562), counsel for respondent made a motion for judgment on the cross-complaint (R. 2562). In making that motion he stated,

> "This motion is * * * also for liquidated damages at the penalty prescribed in the amount of $500 per day. *We are not asking for special damages for delay, but rely upon the penalty for liquidated damages.*" (R. 2563).

Petitioners then moved to strike this evidence from the record (R. 2564). One of the grounds of the mo-

tion was that the elements of damage sought to be established were remote and speculative (R. 2565).

In replying to this motion counsel for respondent stated:

> "Mr. Wittschen: Your Honor, so that the record may be clear, that portion of plaintiff's motion which is directed to the cost of protecting the work and taking care of the project until new bids were called is an element of damage that springs from the breach. *The cost of the bond issue, the interest on the bonds, the cost as shown to the traveling public, and those matters that counsel claims are speculative were not offered and we are not asking for those as specific items of damage. They were merely offered to show two things, one that the liquidated damages were not unreasonable, and also to show the difficulty of the proof of actual damages.* The law in California is that where actual damages cannot be proven, or that their proof will be extremely difficult, the parties may agree upon reasonable stipulated liquidated damages, and as I said before and now repeat we are not asking for double damages, we are not asking for damages in excess of the penalty of $500 a day, but we are asking for damages for that penalty because we think it is reasonable, and because it comes within the rule."

After the arguments on the motions for judgment on the cross-complaint (R. 2592) counsel for respondent made the statement set forth in the appendix to respondent's brief at pages vii to ix upon which it

places its entire reliance for the contention that it sought and proved actual damages from delay. Respondent states in its brief, at page 35, that it stated before the case was concluded that it wished the damage item of $272.89 a day, the cost of keeping the District intact, and the interest charges of $89,832.67 considered for all purposes and that it took the position at the trial that it wished to have evidence before the Court to sustain an award for actual damages for delay if liquidated damages were denied.

The portion of the record quoted by respondent does not support the foregoing statements in its brief. All that counsel for respondent said in that quotation was that respondent wanted the evidence as to those items considered as proving *facts*. He did not ask that they be considered as proof of actual damage. Of course, they proved facts, but proof of those facts was offered only for the purpose of sustaining the liquidated damage clause.

In any event, counsel for petitioners promptly objected to the evidence being considered for any purpose other than that for which it was offered (R. 2596-99) and Court was adjourned for the day without the Judge taking any action on the request of respondent (R. 2599).

On the following day (the last of the trial) counsel for respondent did not renew his request, or ask the Court to rule on it, or make any offer of this evidence for the purpose of proving actual damages and the

case was submitted without any ruling whatever by the Court on respondent's request (R. 2600-2610). The Court did not even rule on petitioners' motion to strike (R. 2607-10). Obviously, the mere statement of counsel, made after all the evidence was closed, that he wished this evidence considered as proof of facts, with no attempt made to reoffer it and with no ruling of the Court on even this narrow request that certain of the evidence be considered as proof of facts cannot be considered as converting evidence, admitted at the trial for the limited purpose of proving that actual damage was impossible or extremely difficult to prove, into proof of actual damages which would support a judgment.

(c) Even if respondent had claimed actual damage from delay it offered no competent evidence to prove such damage.

The alleged damage to the public was not damage to respondent. The project being constructed was a free public highway and respondent could suffer no damage in loss of revenue from delay in its completion (R. 2530).

Respondent cannot recover as actual damages interest on its bonds. It sold the bonds before it entered into the contract and the bonds and the interest thereon were unconditionally payable whether respondent ever completed its project or not (R. 2546-7). The amount payable was not increased by one cent by any delay which may have occurred in completing the

contract work. Respondent was required to pay this interest as a result of a contract made with the purchasers of the bonds, not as a result of any breach of the construction contract.

The daily cost of operating respondent is not a proper item of actual damage. If respondent had offered evidence of direct costs necessarily increased by the delay, it might contend that there was some proof in the record of actual damage from delay. But it did not do this. It simply proved its daily operating costs. It admitted that the $272.89 per day figure included costs not attributable to delay in the completion of this work, that such proof "was not offered as an exact item of damage" and that it did not ask the Court so to consider it.

We quote from the record:

"Mr. Wittschen:

"* * * *The actual damages for delay cannot be proven.* Take, for instance, the construction of a city hall, take a school building, it is impossible to show just what the inconvenience and damage would be to the public that want to use a new school building or to the public that wanted to use a city hall. We have merely shown, your Honor, we had several millions of dollars invested in this project, and that the cost on that alone amounted to more than $200 a day. We have also shown, your Honor, that the cost of keeping the District intact amounted to $278 a day. It is perfectly obvious that you cannot get that cost down to exact refinement. *The District*

will have to keep some nominal assistance as long as the bond issue holds; in fact, there would be no cost if the county would take that over, it is hard to say, the District may have to keep this force going for some days, even after this contract has been completed, to do certain check-up work. That $278 was not offered as an exact item of damage, and we are not asking your Honor to consider it as such, but the people who really lose the benefit of this tunnel are not alone the people residing in the District who use it, but they are the entire traveling public up and down the State.

"The Court: It is my thought on that that we are getting into the realm of speculation.

"Mr. Wittschen: That is why you have liquidated damage, because you cannot prove the actual damage; if the actual damages could be proven we would have to prove them, we could not have liquidated damages, and the Code provision provides, I think it is Section 1671 of the Civil Code—I will get it if your Honor wants it accurately." (R. 2568-2569)

There is no competent evidence of any actual damage to respondent from delay in the record and any judgment for actual damage would be wholly unsupported.

(d) Judgment and opinions of the Courts below.

The judgment of the District Court for delay was based entirely on the liquidated damage clause in the contract and was for liquidated, not actual, damages (R. 217). The opinion of the District Court (R. 130)

and the Circuit Court of Appeals (R. 2623) both show clearly that those Courts were considering only the right of respondent to liquidated damages and the respondent's right to, or the amount of, its actual damages was not even considered.

If respondent had any intention of contending that it was entitled to actual damages for delay it, by its repeated assertions and arguments as to the purpose for which it offered this evidence, misled petitioners and misled the Courts below.

It is submitted that the statements in our brief in support of our petition that respondent neither pleaded nor attempted to prove actual damages are entirely accurate and correct and that respondent is now at this late date attempting to get this Court to consider evidence for an entirely different purpose from that for which it was admitted and is attempting to change the entire theory upon which it tried, and represented to petitioners and the lower Courts it was trying, this issue of the case.

CONCLUSION.

We have attempted to confine this brief to answering new matters presented in respondent's brief and have avoided, so far as possible, repetition of points fully argued in our opening brief. This was done for the purpose of brevity and we reaffirm all the points asserted by us in the opening brief.

Dated: San Francisco, California, September 17, 1940.

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(APPENDIX FOLLOWS)

Appendix

The liquidated damage provision in the contract in the case of *Sinnott v. Schumacher,* 45 Cal. App. 46, 187 Pac. 105, was as follows:

> "Should the Contractor fail to complete this contract and the work provided for within the time set for completion as aforesaid, due allowance being made for the contingencies provided for herein, he shall then become liable to the Owner for all loss and damages which the Owner may suffer on account thereof, in the sum of Ten Dollars per day, which the Contractor hereby agrees to deduct from his contract price, for each day that the work shall remain unfinished beyond such time for completion.
>
> "The agreement in this paragraph made for damages is made as herein set forth for the reason that the actual damage which will be sustained by the Owner by reason of the Contractor's breach of the covenant to complete this contract within the time stated is from the nature of the case impracticable and extremely difficult to fix; and one of the considerations moving the owner to enter into this contract with the contractor is the agreement of the contractor to complete his said contract within the time herein stated and the liquidated damages herein above stated for his failure to do so."